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13 GUARDANT HEALTH, INC.

14 Plaintiff and
 15 Counterclaim-Defendant,

16 vs.

17 NATERA, INC.

18 Defendant and
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Case No. 3:21-cv-04062-EMC

**GUARDANT'S RESPONSE TO
NATERA'S TRIAL BRIEF
REGARDING REFERENCES TO
"APPLES-TO-ORANGES" EVIDENCE
(DKT. 788) AND COMPLAINTS
ABOUT GUARDANT'S LAWYERS'
ADVOCACY (DKT. 789)**

Next Trial Date: November 12, 2024

Guardant respectfully offers this response to Natera’s “apples-to-oranges” trial brief, Dkt. 788, and its complaints about Guardant’s lawyers’ trial advocacy, Dkt. 789.

I. It is fair and necessary for Guardant to refer to “apples-to-oranges” in its opening argument and in factual questions

This is a case that, at its heart, is about Natera’s apples-to-oranges false advertising. It is so central to the case that it is included, over Natera’s repeated objections, in the Court’s Final Jury Instructions. Dkt. 759 at Instruction No. 31. There is nothing improper about using the phrase “apples-to-oranges” in opening arguments, as demonstrated by Mr. Johnson’s own opening on behalf of Natera:

The evidence will show this is not apples-to-oranges. This is data from two published clinical trials that each evaluated the performance of a product used to test for recurrence of colorectal cancer.

Trial Tr. 236:19-22;

Now, Guardant argues it was wrong for Natera's ads to compare data from the Parikh study with data from the Reinert study. That's what they call the apples-to-oranges comparison. And you'll hear that every piece of data in this ad is literally true and taken directly from the cited references.

Trial Tr. 264:20-25;

The evidence will show the difference in sample volume size does not make the studies apples-to-oranges. Once again, Guardant says one thing when it's helpful to them and another when it's not.

Trial Tr. 268:18-23.

Nor is it in any way improper to ask a witness whether a side-by-side comparison is a fair, “apples-to-apples” comparison, or if it is an unfair, “apples-to-oranges” comparison. “Apples-to-oranges” is a concept found in both Parties’ cited exhibits, including, for example, TX-056 (transcription of Mar. 21, 2021 Natera presentation, “Evidence Review: Tumor-Informed vs. Tumor-Naïve MRD,” at 2) (training Natera’s sales representatives that: “where it is possible to make some ‘apples-to-apples’ comparison, it looks like tumor-informed method performs significantly better, pretty much across every metric”); *see also* TX-1309 at 19 (earnings call transcript). In testifying about Natera’s May 6, 2021 training of its sales representatives, TX-069 (“Guardant Reveal CRC Review (COS training”)), Natera’s former head of oncology sales, Dr.

1 Kevin Masukawa, admitted he had presented Natera's side-by-side comparisons as "apples-to-
 2 apples" to Natera's sales force:

3 BY MS. KELLER:

4 Q. When communicating with the sales force about this performance grid, you
 indicated these were apples-to-apples comparisons, didn't you?
 5 A. Yes, in terms of the metrics that we were looking at.
 Q. You suggested it was an apples-to-apples comparison; right?
 A. *I believe the term I used was "as close to apples-to-apples as you can get."*
 Q. Right. "As close to apples-to-apples as you can get," that was your phrase;
 right?
 A. Correct.

8 Trial Tr. 578:18-579:3 (emphasis added). In light of this testimony, it was entirely proper for
 9 Guardant to then ask:

10 Q. And that wasn't true, was it?
 A. What wasn't true?
 11 Q. It wasn't true at all, that it was as close to an apples-to-apples comparison
 as you could get. It was apples-to-oranges, wasn't it?
 A. No.
 Q. Well, you now agree that it would be a mischaracterization for Natera's sales
 representatives to claim Signatera had outperformed Reveal in an apples-
 to-apples comparison? That would be a mischaracterization; right?
 A. I was cautious to use the term --
 Q. Not my question.
 15 You now agree it would be a mischaracterization; true?
 A. Mischaracterization to say what again? Sorry.
 16 Q. So if the sales representatives went out and said, "Look, this is an apples-
 to-apples comparison and Signatera outperforms Reveal," that would be
 wrong; right?
 A. I think, without context, that's -- I do not like that statement.
 Q. In fact, that would be a mischaracterization; right?
 A. I think without additional context, that statement is not the best statement.

19 Trial Tr. 579:4-25. But as the trial record makes clear, Dr. Masukawa's hedging was itself
 20 misleading:

21 MS. KELLER: Your Honor, I'd like to read from Page 270, Lines 10 through 14,
 22 of the deposition transcript.

23 ...

24 "QUESTION: And you agree with me that on this Signatera versus Reveal
 25 performance comparison, this is not apples-to-apples; right?
 "ANSWER: Because they're different studies.

26 "QUESTION: Yeah.
 "ANSWER: Yes.

27 "QUESTION: So if the sales representatives went out and said, 'Look, this is an
 apples-to-apples comparison and Signatera outperforms Reveal,' that would
 be wrong; right?

"ANSWER: That would be a mischaracterization."

Trial Tr. 579:1-579:25. Preventing Guardant from asking Natera's witnesses about such admissions makes no sense, and is obviously prejudicial.

Likewise, Natera’s suggestion that because “apples-to-oranges” is referenced in the jury instruction, it is somehow a legal conclusion makes no sense. That very same instruction, No. 31 (Dkt. 759), instructs the jury as to “false or misleading” advertising. It cannot be that a witness in a false advertising case cannot be asked—and cannot testify—whether a specific ad is “false.” E.g., *U.S. v. DeFloor*, 625 Fed. Appx. 784, 787 (9th Cir. 2015) (in a False Claims Act case, expert allowed to testify that defendant’s claims were “false”).

In *DeFoor*, the Ninth Circuit explained that a witness may testify using phrases that have a legal meaning, including that a defendant “voluntarily robbed a bank” or “acted under fear of death or grave bodily harm” “because ‘the average layperson would understand those terms and ascribe to them essentially the same meaning intended by the expert witness.’” *Id.* at 786 (quoting *U.S. v. Hearst*, 563 F.2d 1331, 1351 (9th Cir. 1977) (brackets omitted). And in *DeFoor*, “it is clear that, when Agents Bare and Bauer testified that Defoor’s claims were ‘false,’ they were using the term in a manner that the average layperson would understand.” *Id.* at 786-87 (quotations omitted). Importantly, the appellant in *DeFoor*, like Natera, had “not identified, nor have we found, any authority suggesting that the term ‘false’ has a specialized meaning in the law that is different from what the term means in the vernacular.” *Id.* at 787. Similarly, Natera has not argued, much less shown, that “apples-to-oranges” was used with a specialized meaning during questioning beyond the lay jury’s understanding.

Unlike questions of law, “[a] lay witness may testify as to an ultimate issue of fact, so long as the testimony is otherwise admissible.” *U.S. v. Crawford*, 239 F.3d 1086, 1090 (9th Cir. 2001). In *Crawford*, the Ninth Circuit addressed whether three questions were acceptable questions of fact, or improper questions about the law. The first question went to the definition of “an affiliated organization,” to which the witness answered: “We consider an affiliated organization an organization that uses the University’s name, facilities, personnel or equipment in the course of

1 their activities.”” 239 F.3d at 1091. This was *not* a question of law:

2 The question did not call for Trentalange to explain the legal definition of “affiliated
3 organization,” or to conclude that the Arthur Wesley Dow Association was an
4 “affiliated organization.” Nor did Trentalange so testify. He simply told the jury,
5 based on his experience with UCLA’s policies, how UCLA used the term “affiliated
6 organization.”

7 *Id.* A question as to ownership also was not problematic. *Id.* In this regard, a witness answered
8 “no” to the question: “does the fact that a particular item doesn’t appear on an inventory mean that
9 the University is basically saying we don’t own it?” *Id.* But the witness “did not conclude that, in
10 such circumstances, UCLA would or would not own a particular item; he only testified that such
11 a circumstance would not signify that the University intended to forgo ownership.” *Id.* The only
12 problematic question—that in the end harmless question—went to the legal term “abandonment.”
13 *Id.* (“the jury could have read Trentalange’s statement to mean that UCLA cannot, as a matter of
14 law, be found to have ‘abandoned’ property).¹

15 “Apples-to-oranges” is not a legal concept like “abandonment,” but rather a colloquial
16 description of a comparison between two things that are not alike. Just as a witness may testify
17 whether advertising is truthful or false, it is entirely appropriate for a witness to be asked whether
18 a comparison with which the witness is personally familiar is an “apples-to-apples” or “apples-to-
19 oranges” comparison. *DeFoor*, 625 Fed. Appx. at 786-87; *see also J.G. v. Los Angeles Unified*
20 *School District*, 19-cv-126, 2020 WL 6565322, at *4 (C.D. Cal. 2020) (testimony by lay witness
21 that placement in program was “proper” and “appropriate”, though probative as to the ultimate
22 issue of fact for plaintiff’s ADA claim, was nonetheless appropriate because the meaning of those

23 ¹ *Imbach v. Clark*, No. 09-cv-1957, 2012 WL 3206670 (C.D. Cal. Jan. 10, 2012), the only other
24 cases cited by Natera, involved a habeas petition arising from a state court conviction. In the
25 section cited by Natera, the Magistrate Judge agreed with the California Court of Appeal that a
26 prosecutor’s questions to the criminal defendant’s mother regarding her “son’s addiction to child
27 pornography” were “argumentative because they were asked not to elicit relevant testimony from
28 the witness, but rather to seek to make the point that the witness did not find petitioner’s ‘addiction
29 to child pornography’ inappropriate, and that she did not want to know about that addiction.” *Id.*
30 at *37. The court went on to conclude that questioning did not deprive the petitioner of due process.
31 It is not clear what possible relevance this case could have to the issues raised in Natera’s trial
32 brief; the questions about “apples-to-oranges” comparisons were not argumentative, but rather
33 asked to secure relevant testimony.

1 terms was based on common knowledge and, in context, had no legal significance that might
 2 require professional expertise); *Fulfer v. WinCo Holdings, Inc.*, 1:15-cv-999, 2019 WL 5536326,
 3 at *9 (E.D. Cal. 2019) (rejecting argument that lay testimony called for improper legal conclusion
 4 where: (1) testimony was based on personal knowledge; and (2) “it is not a legal conclusion for
 5 Plaintiff to declare that he intended to avail himself of any FMLA leave which he had available.
 6 Plaintiff does not need to exercise legal judgment in order to tell his supervisors that he himself
 7 intended to do something in the future.”)

8 Guardant’s questions about “apples-to-oranges” go to key facts of this case, and are in no
 9 way improper.

10 **II. Guardant’s trial lawyers are acting well within the bounds of acceptably advocacy**

11 Natera’s complaint about Guardant’s lawyers’ trial advocacy is simply misplaced. It was
 12 plain to all that Natera’s witness, Dr. Masukawa, had been thoroughly prepared to be non-
 13 cooperative. Guardant’s counsel treated Dr. Masukawa respectfully but firmly. While Natera now
 14 claims that such treatment was “improper,” most of the supposed examples highlighted by Natera
 15 were met with no objections at trial. E.g., Dkt. 789-2, citing excerpts of Trial Tr. 496 (no
 16 objection); 513-514 (no objection); 517-518 (no objection); 520-521 (no objection); 524-525 (no
 17 objection); 532-533 (no objection); 561 (no objection); 567 (no objection); 585 (no objection); 589
 18 (no objection). In the few instances Natera preserved an objection, and the Court agreed with it,
 19 Guardant promptly moved on. E.g., Dkt. 789-2 (excerpts of testimony at Trial Tr. 525:21-526:4: “If
 20 the witness doesn’t answer properly, I will instruct him he should answer ‘yes’ or no,’ and I said
 21 I’ll give you a short chance to explain. So please listen to the question.”) This, of course, is how
 22 objections are handled: they are raised, and if appropriate, sustained, and the Court’s direction is
 23 followed. There is no suggestion that Guardant has not faithfully complied with the Court’s
 24 directions in this case.

25 But there is a potential problem highlighted by Natera’s submission. As Natera notes, “[w]e
 26 are still at the outset of the trial” Dkt. 789 at 2. Although the Parties engaged in a four-hour
 27 meet-and-confer on the evening of Sunday, November 10, 2024, to discuss exhibit objections,

1 Natera made no mention of its intent to file either of its Trial Briefs, or raise with counsel any
 2 concerns they had about either the use of “apples-to-oranges,” or its generalized complaints about
 3 Guardant’s lawyers’ trial advocacy. Instead, they filed back-to-back briefs on a federal holiday.

4 Going forward, Guardant proposes that the Parties reduce the burden on the Court with
 5 unnecessary submissions. There is no apparent reason Natera’s submissions needed to span more
 6 than a page or two. Dkt. 719 (directing Parties to submit a one-page brief regarding Court’s
 7 discretion to control presentation of witness testimony); Dkt. Nos. 720 & 721 (briefs complying
 8 with Court’s direction).

9 **III. Conclusion**

10 Natera’s complaints about “apples-to-oranges” evidence and Guardant’s lawyers’ trial
 11 advocacy should be rejected.

12 Dated: November 11, 2024

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document has been served on November 11, 2024, to the counsel of record via email to qe-natera-guardant@quinnemanuel.com.

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